

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13976
Docket No. 13845
08-2-NRAB-00002-070026
07-2-26

The Second Division consisted of the regular members and in addition Referee James E. Conway when award was rendered.

**(International Brotherhood of Electrical Workers
PARTIES TO DISPUTE: (
(BNSF Railway Company**

STATEMENT OF CLAIM:

- “1. That in violation of the controlling Agreement, Rule 35 in particular, the BNSF Railway Company, as a result of an unfair and unwarranted investigation held on Tuesday, March 4th, 2006 at the Shop Superintendent’s office in Lincoln, Nebraska, arbitrarily assessed Mechanical Department Electrician Jeffrey Erickson a ten (10) day record suspension with one (1) year probation period.**
- 2. That accordingly, the BNSF Railway Company be ordered to promptly make Electrician Jeffrey Erickson whole for all lost wages, rights, benefits and privileges which were adversely affected as a result of the investigation and unjust assessment of discipline, and further, that all record of this matter be expunged from his personal record, all in accordance with the terms of Rule 35, Paragraph G of the controlling Agreement.”**

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

After being observed in a prone position in his locomotive while on duty on January 17, 2006, Electrician Erickson was directed to attend an investigation on January 31, 2007 to respond to charges that he was in violation of Carrier's Rule S-28.11 - SLEEPING. After considering the evidence adduced at that hearing, by letter dated March 31, 2006 Carrier imposed the ten-day record suspension and one-year probationary period here challenged by the Organization on Claimant's behalf.

The record reflects that at approximately 1:40 a.m. on January 17, 2006, Third Shift General Foreman Jody Grigg was checking work progress in the Lincoln Diesel Shop when he observed Claimant sitting in the Engineer's seat of Locomotive BNSF 4412 with his head back, apparently sleeping. He approached the unit from the Conductor's side, went up the back of the locomotive and as he peered through the window saw a second employee, Electrician Randall Hedrick, lying across two Conductor's seats on his right side. Relief Supervisor Ed Maynez was summoned to the scene. After observing the two men in the cab for approximately five minutes they opened the cab door and wrote up both for sleeping on duty.

Carrier takes the position that there can be no other reason except sleeping to account for the position Claimant was observed in. The Organization contends that in addition to several problems with the accuracy and completeness of the hearing transcript it was furnished, Carrier has produced no conclusive evidence to substantiate its charges.

Claimant admits leaning back in his seat at rest, but denies either sleeping or reclining. He explains, and the record evidence confirms, that all work had been paused for the track on which Claimant was working at the time of this incident and accordingly he was not expected to have been working while the red lights remained on from 1:10 a.m. until 2:02 a.m.. The testimony of the Carrier officers involved further establishes that their observations were made from a vantage point that does not easily permit seeing into the cab. Mr. Grigg, for example, admits that he did not

see Claimant's eyes. Mr. Maynez candidly admits that he could not see Mr. Hedrick through the tinted glass of the cab side window.

While notoriously fact-specific, cases involving discipline for sleeping incidents tend to break along classic patterns. Because sleep cannot normally be established to a scientific certainty, reasonable inferences must be drawn from surrounding circumstances, and in that process credibility factors often play a critical role. Thus, the burden of proof for the employer who finds an employee "making a bed" in an isolated area may be easier to shoulder than in a case such as the instant matter. Although recognizing that Carrier's Hearing Officer is entitled to very substantial deference on credibility issues, however, the Board is of the view that in the absence of any testimony from Carrier officials indicating that Claimant's eyes were closed there is insufficient probative evidence of a Rule violation to support the discipline imposed.

Given the lapse of time since the incident at issue, it may be that if Claimant was not responsible for subsequent rules violations the record suspension and probationary period at the center of this Claim are in a sense moot issues. Accordingly, if it has not already done so, Carrier is directed to remove all references to this matter from Claimant's personal record in light of the Findings.

AWARD

The claim is sustained. Within not less than thirty (30) days from adoption of this Award, Carrier is directed to remove all references to the ten (10) day record suspension from Claimant's service records and the one (1) year probationary period imposed as a result of this incident at issue.

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 25th day of November 2008.